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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

NUMBER 655

RADCLIFF GRAVEL COMPANY, INC., and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

Versus

JOSEPH H. HENDERSON, as Deputy Commissioner United States Employees Compensation Commission for the Seventh Compensation District, SAM ROCKER, et al.

Respondents.

**PETITION FOR WRIT OF CERTIORARI**

BRIEF FOR PETITIONERS

BY

PALMER PILLANS

WILLIAM G. CAFFEY

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IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

NUMBER.....

RADCLIFF GRAVEL COMPANY, INC., and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

Versus

JOSEPH H. HENDERSON, as Deputy Commissioner United States Employees Compensation Commission for the Seventh Compensation District, SAM ROCKER, et al.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

Radcliff Gravel Company, Inc. and American Mutual Liability Insurance Company pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the case of Radcliff Gravel Company, Inc. and American Mutual Liabiliy Insurance Company v. Joseph Henderson, as Deputy Commissioner United States Employees Compensation Commission for the Seventh Compensation District, Sam Rocker, Sr., et al., Number 10736 on the docket of said court entered on November 3, 1943 (Rec. p. 116) affirming the final judgment of he District Court of the United States for the Southern Disrict of Alabama in said cause (Rec. p. 106).

## SUMMARY STATEMENT OF MATTER INVOLVED.

On September 2, 1942, Joseph H. Henderson, as Deputy Commissioner for the Seventh Compensation District, United States Employees Compensation Commission entered an award under the Longshoremen's and Harbor Workers' Compensation Act awarding compensation for the death of an employee of Radcliff Gravel Company, Inc., against petitioners as employer and insurance carrier (R. p. 18). A proceeding was instituted by petitioners in the United States District Court for the Southern District of Alabama to review, set aside and enjoin said order (R. p. 2). A decree dismissing appellant's petition or libel to review, revise and enjoin said order was entered by said District Court (R. p. 106) and on appeal to the United States Circuit Court of Appeals for the Fifth Circuit said decree was affirmed by that court (R. p. 116).

The essential facts in regard to the employment of decedent and the circumstances and conditions under which he met his death were stipulated before the Deputy Commissioner (R. p. 35, 36-39). The facts stipulated show that Radcliff Gravel Company, Inc. employed the decedent, to whose dependent compensation was allowed under the Longshoremen's and Harbor Workers' Compensation Act, with others in dredging operations which it was then conducting at Three Rivers Lake, a navigable body of water in Clarke County, Alabama.

The purpose of the dredging operations was to produce or acquire gravel and sand to be sold by Rad-

cliff Gravel Company, Inc., in the prosecution of a gravel and sand business conducted in Mobile, Alabama. The dredging operations themselves consisted in raising said materials from the bottom of the lake and drawing them through pipes by means of a suction type dredge. These pipes discharged the materials into barges provided by Radcliff Gravel Company, Inc. for their reception. Some workmen or employees operated the dredge, some moved the barges up and down alongside the dredge, while the gravel and sand were being sucked into them by the dredge. The decedent, as the gravel and sand were sucked into the barges, leveled it off to keep it from forming cone-shaped piles. He worked with and as part of the dredging crew, and his work was essentially a part of the dredging operations. He did not place the gravel and sand on the barges. That was done by means of the suction dredge operated by other employees. He had nothing to do with, and took no part in, the moving of the barges to Radcliff's sand and gravel yard in Mobile. His sole function was to level off gravel and sand as it was deposited in barges by the operation of the dredge. The pumping of the gravel and sand into the barges by others was preliminary to and was entirely incidental to its subsequently being towed to Mobile. It was primarily and directly a **dredging operation** to produce gravel and sand by pumping it from the bottom of the lake.

At the time of his death decedent was not engaged in any work under his contract of employment. At six o'clock on the morning of December 23, 1941, he and his shift finished their work for the day and were knocked off until after Christmas. A number of this

shift, including decedent, thereafter started in a small boat propelled by an out-board motor for McIntosh Landing en route to Mobile, where they were to be paid off. They were to go home for the Christmas holidays and were expected to return to work on December 26th. After the out-board motor boat had gone about a mile from the dredge and had reached a point about four miles from McIntosh Landing it capsized or swamped and decedent was thrown into the waters of Three Rivers Lake and drowned. The outboard motor boat was furnished by the employer, Radcliff Gravel Company, Inc. for use in transporting its employees to and from their work at the scene of the dredging and to carry them to and from the shore where they were off duty and had occasion to go ashore and to return to the dredge. Under his employment deceased had nothing to do with the operation of the outboard motorboat and was not operating it on the occasion when he was drowned.

## JURISDICTIONAL STATEMENT

This is a civil suit in admiralty in the United States Circuit Court of Appeals for the Fifth Circuit in which petitioners pray a writ of certiorari to review the judgment of said Circuit Court of Appeals, rendered in the above entitled cause on November 3, 1943 (R. p. 116) under section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

The question here presented is whether on the stipulated and undisputed evidence the employee's death occurred upon the navigable waters of the United States under such circumstances that compensation could not "validly be provided by State law" so as to bring the case within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U. S. C. A. Sec. 903).

## REASONS FOR GRANTING THE WRIT.

United States Circuit Court of Appeals for the Fifth Circuit by its judgment affirming the decree of the United States District Court for the Southern District of Alabama has decided a federal question in a way in conflict with applicable decisions of this court (Sultan Ry. Co. v. Dept. of Labor, 277 U. S., 135, 136-137; 48 S. Ct., 505, 506; 72 L. Ed., 82; Baizley Iron Works v. Span, 281 U. S., 222; 50 S. Ct., 306, 307; 74 L. Ed., 819; Alaska Packers Ass'n. v. Ind. Acc. Comm., 276 U.S., 467; 48 S. Ct., 346; 72 L. Ed., 656; Davis v. Dept. of Labor, 63 S. Ct., 225) and in conflict with the decisions of other Circuit Courts of Appeal.

PALMER PILLANS,

WILLIAM G. CAFFEY,

PROCTORS FOR PETITIONERS.

# BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

## OPINIONS BELOW.

There was no opinion rendered by the District Court in the above cause. The opinion in the Circuit Court of Appeals for the Fifth Circuit is reported in 138 Fed. (2d) 549.

## JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on November 3, 1943 (R. p. 116). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 240 (a); 43 Stat., 936).

## STATEMENT

A concise statement of the proceedings and of the question involved has been made in the foregoing petition.

## SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Fifth Circuit erred in affirming (R. p. 116) the final decree of the United States District Court for the Southern

District of Alabama (R. p. 106) dismissing the libel of petitioners (R. p. 2).

2. The Circuit Court of Appeals for the Fifth Circuit erred in affirming (R. p. 116) the final decree of the United States District Court for the Southern District of Alabama (R. p. 106) dismissing the libel of petitioners (R. p. 2) for this, that under the undisputed testimony in the cause, compensation for the death of the deceased employee could "validly be provided by state law" and compensation under the Longshoremen's and Harbor Workers' Compensation Act could not properly be awarded under the undisputed testimony.

## BRIEF OF ARGUMENT

1. In determining whether a contract be of a maritime nature, locality alone is not controlling, since the true test is the subject matter of the contract—the nature and character of the work to be done under it.

Grant Smith-Porter Co. v. Rohde, 257 U. S. 469; 42 S. Ct., 157; 66 L. Ed., 321.

Erie R. Co. v. Welsh, 242 U. S. 303, 306, 37 S. Ct., 116; 61 L. Ed., 319.

State Ind. Comm. of N. Y. v. Nordenholt Corp., 259 U. S., 263, 42 S. Ct., 473; 66 L. Ed., 933.

2. The obtaining of materials by dredging was the primary purpose of the contract of employment of all Radcliff's dredging crew, including decedent, and a contract of employment to carry on or aid in dredging operations is not a maritime contract.

United Dredging Co. v. Lindberg, 18 Fed. (2d) 453 (C.C.A. 5th Circ.); 274 U. S., 759, 47 S. Ct., 769.

Fuentes v. Gulf Coast Dr. Co., 54 Fed. (2d) 69 (C.C.A. 5th Circ.).

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Orleans Dredging Co. v. Frasie, 161 So., 699 (Miss.); 296 U. S., 653, 56 S. Ct., 383.

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Lindberg v. So. Casualty Co., 15 Fed. (2d) 54.

Southern Surety Co. v. Crawford, 274 S. W. 280, 281; 46 S. Ct., 353.

3. Decedent's contract was a contract to engage in "dredging operations," just as the contract of the employee involved in Sultan Ry. Co. v. Dept. of Labor, 277 U. S., 135, 136, 137, 48 Ct., 505, 506; 72 L. Ed., 82, was to engage in "logging operations" (Baizley Iron Works v. Span, 281 U. S., 222; 50 S. Ct., 306, 307, 74 L. Ed. 819 was just as the contract of employees of Alaska Packers Association was to engage in "canning operations", (Alaska Packers Ass'n v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.). Surgeon v. Alaska Packers Ass'n, 26 Fed. Supp., 241 (N. D. Cal.). Alaska Packers Ass'n. v. Ind. Acc. Comm., 276 U. S., 467; 48 S. Ct., 346; 72 L. Ed. 656) and just as the employee measuring and cutting steel to proper lengths as it came aboard the barge on which he was working was engaged in "demolition work" in Davis v. Dept. of Labor, 63 S. Ct., 225.

4. Primarily and essentially decedent was employed to aid in the production of gravel and sand for sale in a local business. His contract did not concern the transportation of this material to the employer's yards, and so did not concern navigation or transportation on navigable waters. His services ended before any such transportation was to begin, and if such services were an aid to transportation on navigable waters they were entirely preliminary and purely incidental to such transportation. Decedent's contract of employment was accordingly not a maritime contract.

Sultan Ry. & Tbr. Co. v. Dept. of Labor & Ind., 277 U. S., 135, 138; 48 S. Ct., 505, 72 L. Ed, 820.

Davis v. Dept. of Labor & Ind., 63 S. Ct., 225.

Alaska Packers Ass'n. v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.).
Authorities under **2 Supra.**

5. If the contract of employment be considered maritime in any aspect, it involved merely a dredging operation purely local in scope, not "directly connected with commerce and navigation in their interstate and international aspect" (Great Lakes Dr. & Dock Co. v. Charlet, 134 Fed. (2d) 213, 214 (C.C.A. 5th Circ.) and "having only an incidental relation to navigation and commerce" (Sultan Railway & Tbr. Co. v. Dept. of Labor, 277 U. S., 135, 138, 48 S. Ct., 505, 506; 72 L. Ed., 820). In such cases compensation may "validly be provided by state law", and the state compensation law, not the Longshoremen's and Harbor Workers' Act, applies.

Sultan Ry. & Tbr. Co. v. Dept. of Labor, 277 U. S., 135, 138, 48 S. Ct., 505, 506; 72 L. Ed., 820.

Davis v. Dept. of Labor, 63 S. Ct., 225.

Baizley Iron Works v. Span, 281 U. S., 222; 50; S. Ct., 306, 307-8; 74 L. Ed. 819.

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Travelers Ins. Co. v. Bacon, 119 S. E., 458 (Ga.).

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Great Lakes Dr. & Dock Co. v. Charlet, 134 Fed. (2d) 213, 214 (C.C.A. 5th Circ.).

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Woods v. Merrill-Stevens Dry Dock & Rep. Co., 14 Fed. Supp. 208 (S.D. Fla.).
Orleans Dredging Co. v. Frasie, 173 Miss., 882; 161 So., 699; 296 U. S., 653; 56 S. Ct., 383.
Exparte Rosengrant, 213 Ala., 202; 104 So. 409; 273 U. S., 664; 47 S. Ct., 454. 71 L. Ed., 829.
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Klump v. Ind. Comm., 29 N. E. (2d) 627, 628; 65 Oh. App. 270.
Belk v. Mossman Constr. Co. 275 N. W., 76 (Nebr.).

6. The test of whether decedent was engaged in a maritime service of such character that the state compensation laws could not be validly applied is what employee was doing at the time he met his accidental injury or death, not what he may have been required to do at some other time.

Miller's Ind. Underwriters v. Braud, 270 U. S., 59; 46 S. Ct., 194; 70 Ed., 470.
Parker v. Motor Boat Sales, 314 U. S., 244; 62 S. Ct., 221, 223; 86 L. Ed. 184.
Employers' Liability Assur. Corp. v. Cook, 281 U. S. 233, 236; 50 S. Ct., 308, 309; 74 L. Ed., 823.

7. In this case having definitely terminated all actual service to the employer, the employee while riding to shore in a small boat furnished by his employer in accordance with the contract of employment, was

not rendering any service in direct aid of navigation so as to preclude the application of the State Workmen's Compensation Act.

P. J. Carlin Constr. Co. v. Heany, 299 U. S., 41; 57 S. Ct., 75, 76.
King v. Glenn Falls Ind. Co., 124 Fed. (2d) 942 (C.C.A. 5th Circ.).

8. "Rulings of the deputy commissioner upon questions of law are without finality. So far as the latter are concerned, full opportunity is afforded for their determination by the federal courts through proceedings to suspend or set aside a compensation order**."

Crowell v. Benson, 285 U. S., 22; 52 S. Ct., 285, 290.
And see:
South Chicago Coal & Dock Co. v. Bassett, 309 U. S., 251; 60 S. Ct., 544.
United States Cas. Co. v. Taylor, 64 Fed., (2d) 521 (C.C.A. 4th Circ.).

## ARGUMENT

In this case, an Alabama corporation, carrying on a local gravel and sand business, produced gravel and sand for sale in that business by dredging it from the bed of navigable waters in Clarke County, Alabama, conducting it through suction pipes and depositing it on barges which had no motive power and had to be towed to employer's yards at Mobile, Alabama. By Alabama contract decedent was employed to aid in these dredging operations by levelling gravel and sand as it was so deposited. The decedent was not a long-

shoreman or a stevedore in any true sense of those words. He was a dredge employee doing the work of dredge employees. His contract of employment had no direct relation to navigation. It did not concern the transporting of the dredged materials to the employer's yards, and so did not directly concern navigation or transportation on navigable waters. His services, while being rendered only incidentally and indirectly aided navigation, in that they prepared the materials so they could be more readily moved in navigation. These services ended before any transportation was to begin and if such services were an aid to transportation on navigable waters they were entirely preliminary and purely incidental to such transportation. Decedent's contract of employment was accordingly not a contract which would preclude the application of the State Compensation law.

Authorities under Points 3 and 5, **Supra.**

In the case of Sultan Ry. & Timber Co. v. Dept. of Labor, 277 U.S., 135, 48 S. Ct., 505, 506; 72 L. Ed., 820, the contract of employment of some of the employees there involved required them to boom logs on navigable waters so that they could be towed over navigable waters to a point adjacent to the employer's sawmill. Other employees involved, as part of their contract of employment, broke up the booms and actually moved the logs on navigable waters to the sawmill. It was held that this work constituted a service in a local business, in the one instance preliminary to actual transportation on navigable waters, and in the other after actual transportation on navigable waters had ceased and that the State Compensation law rather

than the Longshoremen's and Harbor Workers' Compensation Act applied to such employees. In the present case, the levelling of gravel and sand incidental to the process of dredging such materials into barges for subsequent towage to Radcliff's yards was certainly no more directly in aid of navigation than was the work of booming logs for such towage or the work of breaking up the booms in order that the logs might be moved over navigable waters to the sawmill, and the service was certainly just as local in character. The case now under consideration, as was said in Baizley Iron Works v. Span, 281 U. S., 222, 50 S. Ct., 306, 308-9, has "relation to the nature of the occupation of men engaged" in dredging operations and neither the fact that the service was performed on navigable waters, nor that it incidentally made the barges ready for towage to the employer's yards, changed the nature of said dredging operations or the local character of the employment.

Under the admitted facts, if the deceased employee had met his death while engaged in levelling gravel and sand on one of Radcliff's barges, his case would fall within the principles decided in Sultan Ry. & Timber Co. v. Dept. of Labor, Supra; Davis v. Dept. of Labor, 63 S. Ct., 225; Alaska Packers Ass'n. v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.); and Alaska Packers Assn' v. Ind. Accident Commission, 276 U. S., 467, 48 S. Ct., 346; 72 L. Ed. 656.

But decedent at the time he met his death was not levelling gravel and sand on the barge as it was pumped in. That duty had been completed prior to the time that he met his death. At the time of his death he

was merely on board a small boat in the course of his employment and his presence there was "purely incidental" to the duties of his employment and without any direct connection with or aid to navigation. What decedent did or was required to do at a prior time under his contract of employment does not control the question of whether he was or was not performing a service in direct aid of navigation at the time of his death. This question is determined by what he is doing at the time of the accident which resulted in his death.

Miller's Indemnity Underwriters v. Braud, 270 U. S., 59; 46 S. Ct., 194; 70 L. Ed., 470.
Parker v. Motor Boat Sales, 314 U. S., 244; 62 S. Ct., 221, 223; 86 L. Ed., 184.
Employers' Liability Assur. Corp. v. Cook, 281 U. S., 233, 236; 50 S. Ct., 308, 309; 74 L. Ed., 823.

Riding in a small boat furnished by his employer under the contract of employment, for the purpose of going ashore and on leave was not a maritime service in direct aid of navigation which excludes application of the State Compensation law.

P. J. Carlin Constr. Co. v. Heany, 299 U. S. 41, 57 S. Ct., 75, 76.
King v. Glens Falls Indemnity Co., 124 Fed. (2d) 942 (C.C.A. 5th Circ.).

The Circuit Court of Appeals has treated as applicable and as controlling in this case the cases of Parker v. Motor Boat Sales Inc., 314 U. S., 244; South Chicago Coal and Dock Co. v. Bassett, 309 U. S., 251 and Henderson v. Jones, 110 Fed. (2) 952.

In the first of these cases it was considered and ruled by the Court that an employee riding in a small boat driven by an outboard motor with the duty of looking out for snags in the river was so far actually engaged in navigation that the State Compensation law could not be applied to him. In this case the employee had no duty to perform in the navigation either of the small motor boat in which he was riding to shore for the Christmas holidays, or in the navigation of any loaded barge when it should come to be towed to Mobile.

The other two cases cited involve the direct performance of duties on the part of the employee in aid of the coaling of vessels engaged in navigation. None of these cases is applicable unless it can be truly said, as the opinion of the Circuit Court of Appeals indicates, that all that is necessary to bring a case within the Longshoremen's and Harbor Workers' Compensation Act is that injury or death should have occurred upon the navigable waters of the United States. So to hold is in direct conflict with the decisions of this Court.

Authorities, Points, 1, 4 and 7, **Supra.**

We respectfully submit that the Court of Appeals has misapplied the holding of the cases which it has relied upon and has failed to apply the decisions of other cases in this Court, and in other Courts of Appeal, directly applicable to the facts as disclosed by the stipulated and undisputed facts of the case.

Authorities, Points 3, 4 and 5, **Supra.**

Respectfully submitted,

PALMER PILLANS

WILLIAM G. CAFFEY

PROCTORS FOR PETITIONERS.

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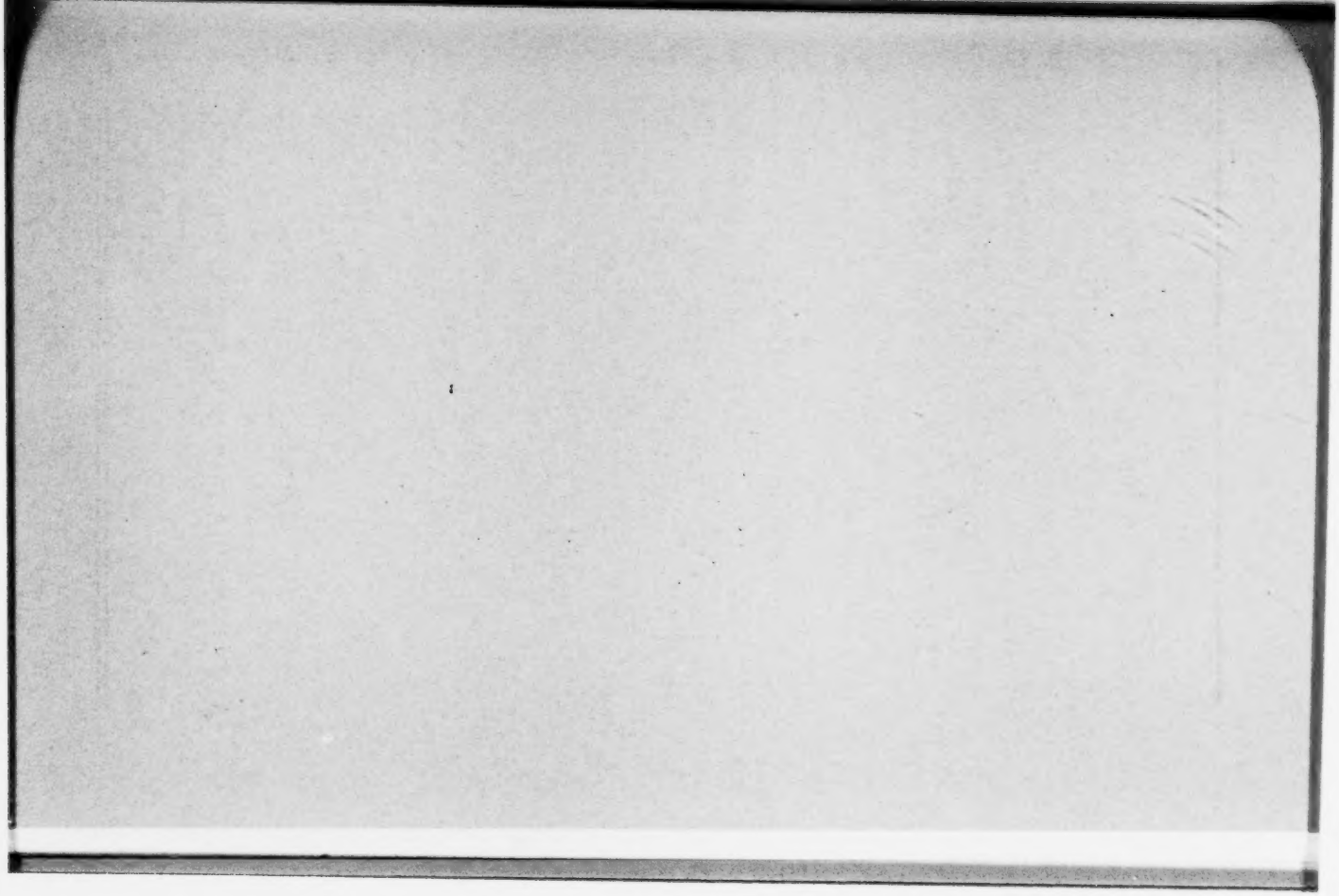

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IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

NUMBER.....

RADCLIFF GRAVEL COMPANY, INC., and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

Versus

JOSEPH H. HENDERSON, as Deputy Commissioner United States Employees Compensation Commission for the Seventh Compensation District, et al.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Radcliff Gravel Company, Inc. and American Mutual Liability Insurance Company pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the case of Radcliff Gravel Company, Inc. and American Mutual Liabiliy Insurance Company v. Joseph Henderson, as Deputy Commissioner United States Employees Compensation Commission for the Seventh Compensation District, et al., Number 10735 on the docket of said court entered on November 3, 1943 (Rec. p. 114) affirming the final judgment of the District Court of the United States for the Southern District of Alabama in said cause (Rec. p. 105).

## SUMMARY STATEMENT OF MATTER INVOLVED.

On September 2, 1942, Joseph H. Henderson, as Deputy Commissioner for the Seventh Compensation District, United States Employees Compensation Commission entered an award under the Longshoremen's and Harbor Workers' Compensation Act awarding compensation for the death of an employee of Radcliff Gravel Company, Inc., against petitioners as employer and insurance carrier (R. p. 17). A proceeding was instituted by petitioners in the United States District Court for the Southern District of Alabama to review, set aside and enjoin said order (R. p. 2). A decree dismissing appellant's petition or libel to review, revise and enjoin said order was entered by said District Court (R. p. 105) and on appeal to the United States Circuit Court of Appeals for the Fifth Circuit said decree was affirmed by that court (R. p. 114).

The essential facts in regard to the employment of decedent and the circumstances and conditions under which he met his death were stipulated before the Deputy Commissioner (R. p. 35, 36-39). The facts stipulated show that Radcliff Gravel Company, Inc. employed the decedent, to whose dependent compensation was allowed under the Longshoremen's and Harbor Workers' Compensation Act, with others in dredging operations which it was then conducting at Three Rivers Lake, a navigable body of water in Clarke County, Alabama.

The purpose of the dredging operations was to produce or acquire gravel and sand to be sold by Rad-

cliff Gravel Company, Inc., in the prosecution of a gravel and sand business conducted in Mobile, Alabama. The dredging operations themselves consisted in raising said materials from the bottom of the lake and drawing them through pipes by means of a suction type dredge. These pipes discharged the materials into barges provided by Radcliff Gravel Company, Inc. for their reception. Some workmen or employees operated the dredge, some moved the barges up and down alongside the dredge, while the gravel and sand were being sucked into them by the dredge. The decedent, as the gravel and sand were sucked into the barges, leveled it off to keep it from forming cone-shaped piles. He worked with and as part of the dredging crew, and his work was essentially a part of the dredging operations. He did not place the gravel and sand on the barges. That was done by means of the suction dredge operated by other employees. He had nothing to do with, and took no part in, the moving of the barges to Radcliff's sand and gravel yard in Mobile. His sole function was to level off gravel and sand as it was deposited in barges by the operation of the dredge. The pumping of the gravel and sand into the barges by others was preliminary to and was entirely incidental to its subsequently being towed to Mobile. It was primarily and directly a **dredging operation** to produce gravel and sand by pumping it from the bottom of the lake.

At the time of his death decedent was not engaged in any work under his contract of employment. At six o'clock on the morning of December 23, 1941, he and his shift finished their work for the day and were knocked off until after Christmas. A number of this

shift, including decedent, thereafter started in a small boat propelled by an out-board motor for McIntosh Landing en route to Mobile, where they were to be paid off. They were to go home for the Christmas holidays and were expected to return to work on December 26th. After the out-board motor boat had gone about a mile from the dredge and had reached a point about four miles from McIntosh Landing it capsized or swamped and decedent was thrown into the waters of Three Rivers Lake and drowned. The outboard motor boat was furnished by the employer, Radcliff Gravel Company, Inc. for use in transporting its employees to and from their work at the scene of the dredging and to carry them to and from the shore where they were off duty and had occasion to go ashore and to return to the dredge. Under his employment deceased had nothing to do with the operation of the outboard motorboat and was not operating it on the occasion when he was drowned.

## JURISDICTIONAL STATEMENT

This is a civil suit in admiralty in the United States Circuit Court of Appeals for the Fifth Circuit in which petitioners pray a writ of certiorari to review the judgment of said Circuit Court of Appeals, rendered in the above entitled cause on November 3, 1943 (R. p. 114) under section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

The question here presented is whether on the stipulated and undisputed evidence the employee's death occurred upon the navigable waters of the United States under such circumstances that compensation could not "validly be provided by State law" so as to bring the case within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U. S. C. A. Sec. 903).

## REASONS FOR GRANTING THE WRIT.

United States Circuit Court of Appeals for the Fifth Circuit by its judgment affirming the decree of the United States District Court for the Southern District of Alabama has decided a federal question in a way in conflict with applicable decisions of this court (Sultan Ry. Co. v. Dept. of Labor, 277 U. S., 135, 136-137; 48 S. Ct., 505, 506; 72 L. Ed., 82; Baizley Iron Works v. Span, 281 U. S., 222; 50 S. Ct., 306, 307; 74 L. Ed., 819; Alaska Packers Ass'n. v. Ind. Acc. Comm., 276 U.S., 467; 48 S. Ct., 346; 72 L. Ed., 656; Davis v. Dept. of Labor, 63 S. Ct., 225) and in conflict with the decisions of other Circuit Courts of Appeal.

PALMER PILLANS,

WILLIAM G. CAFFEY,

PROCTORS FOR PETITIONERS.

## BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

### OPINIONS BELOW.

There was no opinion rendered by the District Court in the above cause. The opinion in the Circuit Court of Appeals for the Fifth Circuit is reported in 138 Fed. (2d) 549.

### JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on November 3, 1943 (R. p. 114). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 240 (a); 43 Stat., 936).

### STATEMENT

A concise statement of the proceedings and of the question involved has been made in the foregoing petition.

### SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Fifth Circuit erred in affirming (R. p. 114) the final decree of the United States District Court for the Southern

District of Alabama (R. p. 105 dismissing the libel of petitioners (R. p. 2).

2. The Circuit Court of Appeals for the Fifth Circuit erred in affirming (R. p. 114) the final decree of the United States District Court for the Southern District of Alabama (R. p. 105) dismissing the libel of petitioners (R. p. 2) for this, that under the undisputed testimony in the cause, compensation for the death of the deceased employee could "validly be provided by state law" and compensation under the Longshoremen's and Harbor Workers' Compensation Act could not properly be awarded under the undisputed testimony.

## BRIEF OF ARGUMENT

1. In determining whether a contract be of a maritime nature, locality alone is not controlling, since the true test is the subject matter of the contract—the nature and character of the work to be done under it.

Grant Smith-Porter Co. v. Rohde, 257 U. S. 469; 42 S. Ct., 157; 66 L. Ed., 321.

Erie R. Co. v. Welsh, 242 U. S. 303, 306, 37 S. Ct., 116; 61 L. Ed., 319.

State Ind. Comm. of N. Y. v. Nordenholt Corp., 259 U. S., 263, 42 S. Ct., 473; 66 L. Ed., 933.

2. The obtaining of materials by dredging was the primary purpose of the contract of employment of all Radcliff's dredging crew, including decedent, and a contract of employment to carry on or aid in dredging operations is not a maritime contract.

United Dredging Co. v. Lindberg, 18 Fed. (2d) 453 (C.C.A. 5th Circ.); 274 U. S., 759, 47 S. Ct., 769.

Fuentes v. Gulf Coast Dr. Co., 54 Fed. (2d) 69 (C.C.A. 5th Circ.).

Woods v. Merrill-Stevens D. D. & Rep. Co., 14 Fed., Supp. 208, (S.D. Fla.).

Orleans Dredging Co. v. Frasie, 161 So., 699 (Miss.); 296 U. S., 653, 56 S. Ct., 383.

Central Eng. Co. v. Bassett, 42 Fed. Supp., 750, 752.

Lindberg v. So. Casualty Co., 15 Fed. (2d) 54.

Southern Surety Co. v. Crawford, 274 S. W. 280, 281; 46 S. Ct., 353.

3. Decedent's contract was a contract to engage in "dredging operations," just as the contract of the employee involved in Sultan Ry. Co. v. Dept. of Labor, 277 U. S., 135, 136, 137, 48 Ct., 505, 506; 72 L. Ed., 82, was to engage in "logging operations" (Baizley Iron Works v. Span, 281 U. S., 222; 50 S. Ct., 306, 307, 74 L. Ed. 819 was just as the contract of employees of Alaska Packers Association was to engage in "canning operations", (Alaska Packers Ass'n v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.). Surgeon v. Alaska Packers Ass'n, 26 Fed. Supp., 241 (N. D. Cal.). Alaska Packers Ass'n. v. Ind. Acc. Comm., 276 U. S., 467; 48 S. Ct., 346; 72 L. Ed. 656) and just as the employee measuring and cutting steel to proper lengths as it came aboard the barge on which he was working was engaged in "demolition work" in Davis v. Dept. of Labor, 63 S. Ct., 225.

4. Primarily and essentially decedent was employed to aid in the production of gravel and sand for sale in a local business. His contract did not concern the transportation of this material to the employer's yards, and so did not concern navigation or transportation on navigable waters. His services ended before any such transportation was to begin, and if such services were an aid to transportation on navigable waters they were entirely preliminary and purely incidental to such transportation. Decedent's contract of employment was accordingly not a maritime contract.

Sultan Ry. & Tbr. Co. v. Dept. of Labor & Ind., 277 U. S., 135, 138; 48 S. Ct., 505, 72 L. Ed, 820.

Davis v. Dept. of Labor & Ind., 63 S. Ct., 225.

Alaska Packers Ass'n. v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.).
Authorities under **2 Supra.**

5. If the contract of employment be considered maritime in any aspect, it involved merely a dredging operation purely local in scope, not "directly connected with commerce and navigation in their interstate and international aspect" (Great Lakes Dr. & Dock Co. v. Charlet, 134 Fed. (2d) 213, 214 (C.C.A. 5th Circ.) and "having only an incidental relation to navigation and commerce" (Sultan Railway & Tbr. Co. v. Dept. of Labor, 277 U. S., 135, 138, 48 S. Ct., 505, 506; 72 L. Ed., 820). In such cases compensation may "validly be provided by state law", and the state compensation law, not the Longshoremen's and Harbor Workers' Act, applies.

Sultan Ry. & Tbr. Co. v. Dept. of Labor, 277 U. S., 135, 138, 48 S. Ct., 505, 506; 72 L. Ed., 820.

Davis v. Dept. of Labor, 63 S. Ct., 225.

Baizley Iron Works v. Span, 281 U. S., 222; 50; S. Ct., 306, 307-8; 74 L. Ed. 819.

Alaska Packers Ass'n. v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.).

Travelers Ins. Co. v. Bacon, 119 S. E., 458 (Ga.).

Alaska Packers Ass'n. v. Ind. Acc. Comm., 276 U. S., 467, 48 S. Ct., 346, 72 L. Ed. 656.

Surgeon v. Alaska Packers Ass'n., 26 Fed. Supp., 241 (N.D. Cal.).

P. J. Carlin Constr. Co. v. Heany, 299 U. S., 41; 57 S. Ct., 75, 76.

Great Lakes Dr. & Dock Co. v. Charlet, 134 Fed. (2d) 213, 214 (C.C.A. 5th Circ.).

United Dredging Co. v. Lindberg, 18 Fed. (2d) 453, 454; 274 U. S., 759; 47 S. Ct. 769.

Lindberg v. Southern Cas. Co., 15 Fed. (2d( 54.
Fuentes v. Gulf Coast Dr. Co., 54 Fed. (2d) 69 (C.C.A. 5th Circ.).
Woods v. Merrill-Stevens Dry Dock & Rep. Co., 14 Fed. Supp. 208 (S.D. Fla.).
Orleans Dredging Co. v. Frasie, 173 Miss., 882; 161 So., 699; 296 U. S., 653; 56 S. Ct., 383.
Exparte Rosengrant, 213 Ala., 202; 104 So. 409; 273 U. S., 664; 47 S. Ct., 454, 71 L. Ed., 829.
Southern Surety Co. v. Crawford, 274 S. W., 280, 281, 46 S. Ct., 353.
In re Herbert's Case, 186 N. E., 554 (Mass.).
Teahan v. Ind. Acc. Comm. 292 Pac. 120 (Cal.).
Central Eng. Co. v. Bassett, 42 Fed. Supp., 750, 752.
Klump v. Ind. Comm., 29 N. E. (2d) 627, 628; 65 Oh. App. 270.
Belk v. Mossman Constr. Co., 275 N. W., 76 (Nebr.).

6. The test of whether decedent was engaged in a maritime service of such character that the state compensation laws could not be validly applied is what employee was doing at the time he met his accidental injury or death, not what he may have been required to do at some other time.

Miller's Ind. Underwriters v. Braud, 270 U. S., 59; 46 S. Ct., 194; 70 Ed., 470.
Parker v. Motor Boat Sales, 314 U. S., 244; 62 S. Ct., 221, 223; 86 L. Ed. 184.
Employers' Liability Assur. Corp. v. Cook, 281 U. S. 233, 236; 50 S. Ct., 308, 309; 74 L. Ed., 823.

7. In this case having definitely terminated all actual service to the employer, the employee while riding to shore in a small boat furnished by his employer in accordance with the contract of employment, was

not rendering any service in direct aid of navigation so as to preclude the application of the State Workmen's Compensation Act.

P. J. Carlin Constr. Co. v. Heany, 299 U. S., 41; 57 S. Ct., 75, 76.
King v. Glenn Falls Ind. Co., 124 Fed. (2d) 942 (C.C.A. 5th Circ.).

8. "Rulings of the deputy commissioner upon questions of law are without finality. So far as the latter are concerned, full opportunity is afforded for their determination by the federal courts through proceedings to suspend or set aside a compensation order**."

Crowell v. Benson, 285 U. S., 22; 52 S. Ct., 285, 290.
And see:
South Chicago Coal & Dock Co. v. Bassett, 309 U. S., 251; 60 S. Ct., 544.
United States Cas. Co. v. Taylor, 64 Fed., (2d) 521 (C.C.A. 4th Circ.).

## ARGUMENT

In this case, an Alabama corporation, carrying on a local gravel and sand business, produced gravel and sand for sale in that business by dredging it from the bed of navigable waters in Clarke County, Alabama, conducting it through suction pipes and depositing it on barges which had no motive power and had to be towed to employer's yards at Mobile, Alabama. By Alabama contract decedent was employed to aid in these dredging operations by levelling gravel and sand as it was so deposited. The decedent was not a long-

shoreman or a stevedore in any true sense of those words. He was a dredge employee doing the work of dredge employees. His contract of employment had no direct relation to navigation. It did not concern the transporting of the dredged materials to the employer's yards, and so did not directly concern navigation or transportation on navigable waters. His services, while being rendered only incidentally and indirectly aided navigation, in that they prepared the materials so they could be more readily moved in navigation. These services ended before any transportation was to begin and if such services were an aid to transportation on navigable waters they were entirely preliminary and purely incidental to such transportation. Decedent's contract of employment was accordingly not a contract which would preclude the application of the State Compensation law.

Authorities under Points 3 and 5, **Supra.**

In the case of Sultan Ry. & Timber Co. v. Dept. of Labor, 277 U.S., 135, 48 S. Ct., 505, 506; 72 L. Ed., 820, the contract of employment of some of the employees there involved required them to boom logs on navigable waters so that they could be towed over navigable waters to a point adjacent to the employer's sawmill. Other employees involved, as part of their contract of employment, broke up the booms and actually moved the logs on navigable waters to the sawmill. It was held that this work constituted a service in a local business, in the one instance preliminary to actual transportation on navigable waters, and in the other after actual transportation on navigable waters had ceased and that the State Compensation law rather

than the Longshoremen's and Harbor Workers' Compensation Act applied to such employees. In the present case, the levelling of gravel and sand incidental to the process of dredging such materials into barges for subsequent towage to Radcliff's yards was certainly no more directly in aid of navigation than was the work of booming logs for such towage or the work of breaking up the booms in order that the logs might be moved over navigable waters to the sawmill, and the service was certainly just as local in character. The case now under consideration, as was said in Baizley Iron Works v. Span, 281 U. S., 222, 50 S. Ct., 306, 308-9, has "relation to the nature of the occupation of men engaged" in dredging operations and neither the fact that the service was performed on navigable waters, nor that it incidentally made the barges ready for towage to the employer's yards, changed the nature of said dredging operations or the local character of the employment.

Under the admitted facts, if the deceased employee had met his death while engaged in levelling gravel and sand on one of Radcliff's barges, his case would fall within the principles decided in Sultan Ry. & Timber Co. v. Dept. of Labor, Supra; Davis v. Dept. of Labor, 63 S. Ct., 225; Alaska Packers Ass'n. v. Marshall, 95 Fed. (2d) 279 (C.C.A. 9th Circ.); and Alaska Packers Assn' v. Ind. Accident Commission, 276 U. S., 467, 48 S. Ct., 346; 72 L. Ed. 656.

But decedent at the time he met his death was not levelling gravel and sand on the barge as it was pumped in. That duty had been completed prior to the time that he met his death. At the time of his death he

was merely on board a small boat in the course of his employment and his presence there was "purely incidental" to the duties of his employment and without any direct connection with or aid to navigation. What decedent did or was required to do at a prior time under his contract of employment does not control the question of whether he was or was not performing a service in direct aid of navigation at the time of his death. This question is determined by what he is doing at the time of the accident which resulted in his death.

Miller's Indemnity Underwriters v. Braud, 270 U. S., 59; 46 S. Ct., 194; 70 L. Ed., 470.
Parker v. Motor Boat Sales, 314 U. S., 244; 62 S. Ct., 221, 223; 86 L. Ed., 184.
Employers' Liability Assur. Corp. v. Cook, 281 U. S., 233, 236; 50 S. Ct., 308, 309; 74 L. Ed., 823.

Riding in a small boat furnished by his employer under the contract of employment, for the purpose of going ashore and on leave was not a maritime service in direct aid of navigation which excludes application of the State Compensation law.

P. J. Carlin Constr. Co. v. Heany, 299 U. S. 41, 57 S. Ct., 75, 76.
King v. Glens Falls Indemnity Co., 124 Fed. (2d) 942 (C.C.A. 5th Circ.).

The Circuit Court of Appeals has treated as applicable and as controlling in this case the cases of Parker v. Motor Boat Sales Inc., 314 U. S., 244; South Chicago Coal and Dock Co. v. Bassett, 309 U. S., 251 and Henderson v. Jones, 110 Fed. (2) 952.

In the first of these cases it was considered and ruled by the Court that an employee riding in a small boat driven by an outboard motor with the duty of looking out for snags in the river was so far actually engaged in navigation that the State Compensation law could not be applied to him. In this case, the employee had no duty to perform in the navigation either of the small motor boat in which he was riding to shore for the Christmas holidays, or in the navigation of any loaded barge when it should come to be towed to Mobile.

The other two cases cited involve the direct performance of duties on the part of the employee in aid of the coaling of vessels engaged in navigation. None of these cases is applicable unless it can be truly said, as the opinion of the Circuit Court of Appeals indicates, that all that is necessary to bring a case within the Longshoremen's and Harbor Workers' Compensation Act is that injury or death should have occurred upon the navigable waters of the United States. So to hold is in direct conflict with the decisions of this Court.

Authorities, Points, 1, 4 and 7, **Supra.**

We respectfully submit that the Court of Appeals has misapplied the holding of the cases which it has relied upon and has failed to apply the decisions of other cases in this Court, and in other Courts of Appeal, directly applicable to the facts as disclosed by the stipulated and undisputed facts of the case.

Authorities, Points 3, 4 and 5, **Supra.**

Respectfully submitted,

PALMER PILLANS

WILLIAM G. CAFFEY

PROCTORS FOR PETITIONERS.